

ST 95-23

Tax Type: SALES TAX

Issue: Disallowed General Deductions
Disallowed Resale Deduction (No Valid Certificates)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
COUNTY OF COOK

THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS) DOCKET NO.
) IBT No.
) NTL NO.
 V.)
) Daniel Mangiamele
) Administrative Law Judge
XXXXXX)
)
Taxpayer)

RECOMMENDATION FOR DISPOSITION

APPEARANCES: XXXXX, for XXXXX; Richard Rohner, Special Assistant Attorney General, for the Illinois Department of Revenue.

SYNOPSIS: This matter comes on for hearing pursuant to the taxpayer's timely protest of Notice of Liability XXXXX issued by the Department on June 15, 1992, for ROT tax. The Department issued its Notice of Tax Liability based on taxpayer's inability to produce resale certificate at the time of the audit for many of its claimed wholesale transactions and use taxes due on consumable supplies. At issue are the questions 1) whether the liability established herein is a result of retail sales or sales for resale, and 2) did the taxpayer present sufficient evidence to overcome Department's prima facie case? Following the submission of all evidence and a review of the record, it is recommended that the issue on resales be resolved in favor of the taxpayer. The use tax issue on consumable supplies be resolved in favor of the Department.

FINDINGS OF FACT:

1. The Department's prima facie case, inclusive of all jurisdictional elements, was established by the admission into evidence of

the correction of returns, showing a total liability due and owing in the amount of \$291,805.00 (Dept. Grp. Ex. #1)

2. An agreed order dated June 14, 1994 was entered by Judge Bonny Barezky whereby counsel for both parties select no more than ten purchasers to be called as witnesses in the hearing to demonstratively show the nature of the transactions. The parties so stipulated on the record. (T-84, 85 & 86)

3. Taxpayer offered no evidence or testimony to rebut Department's prima facie case as to use tax assessed on consumable supplies

4. Taxpayer offered into evidence with respect to the stipulated transactions the following.

- a. Invoices showing sales to witnesses presented at trial.
- b. Resale certificates executed after the date of sale confirming the sale at issue was for resale.
- c. Resale certificates contained the purchasers I.B.T. number.
- d. Paid tax receipt from Illinois Department of Revenue for transaction in dispute.
- e. Copies of purchaser's tax returns that purported to include the purchasers sales for resale of the questioned items purchased from taxpayer and resold at retail.
- f. In some instances, testimony from taxpayer's vendee's customer indicating a retail purchase from taxpayer's customer.

(Taxpayer's Exhibit's No. 1, 2, 3, 4, 5, 6, 8A, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18).

CONCLUSIONS OF LAW: On examination of the record established, this taxpayer has demonstrated by the presentation of testimony, exhibits and argument, evidence sufficient to overcome the Department's prima facie case of tax liability under the assessment in question as it relates to the issue of resales.

The Department issued its Notice of Tax Liability based on taxpayer's inability to produce resale certificates. The parties hereto enter into an agreed order and stipulation, agreeing that for purposes of this hearing,

certain transactions would be representative of all the disallowed resales by the Department. Pursuant to that stipulation, taxpayer presented with respect to the stipulated transactions evidence described as follows:

1. Testimony from purchasers that the purchases at issue was made for the purpose of resale.
2. A resale certificate executed after the date of sale confirming the sale at issue was for resale and said certificate contained the purchasers I.B.T.
3. Invoices reflecting the sale at issue.
4. Copies of purchaser's tax return that purported included the purchasers sale for resale of the questioned items purchased from taxpayer and resold at retail.
5. Testimony from taxpayer's customers vendee's indicating a retail purchase from taxpayer's customer.

Other than the testimony from the Department's auditor concerning audit procedures, no evidence was presented by the Department that was contradictory to taxpayer's presentation.

It is clear that the Department presented a reasonable prima facie case based upon the information at hand at the time of the audit as explained by Department's auditor. It was reasonable to disallow certain claimed sales for resale. Thus, the Department's Notice of Tax Liability as supported by the auditor's correction of returns established a prima facie case, *Masini v. Department of Revenue* 60 Ill. App. 3rd. 11, (First Dist. 1978), 376 N.E. 2d 324; see also *Worthington, Inc. v. Department of Revenue*, 96 Ill. App. 3rd. 1132 (Second Dist. 1981).

The issue to be decided is whether the taxpayer has produced sufficient evidence to rebut the Department's prima facie case. 35 ILCS 120/2c provides in part as follows:

"Except as provided hereinabove in this Section, a sale shall be made tax-free on the ground of being a sale for resale if the purchaser has an active registration number or resale number from the Department and

furnishes that number to the seller in connection with certifying to the seller that any sale to such purchaser is non taxable because of being a sale for resale.

Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sale for resale, or that a particular sale is a sale for resale."

Since taxpayer has presented resale certificates with active registration numbers certifying that the particular sales at issue are for resale. The statute appears to require acceptance of the questioned transactions as sales for resale. Specifically the statute provides the transaction "shall be made tax free" if the above information is supplied to the Department. I find it has been supplied with respect to the transactions stipulated to be determinative of this matter.

Even if the resale certificates provided could be deemed not to fall within the ambit of the statutorily required acceptance, because language not received concurrent with the transaction, the last paragraph of Section 2(c) would allowed taxpayer to overcome the Department's presumption of taxability by the introduction of "other evidence"...that a particular sale is a sale for resale.

The Illinois Appellate Court in discussing this provision has indicated that "other evidence" means that some form of documentation is required to rebut the presumption created by the prima facie case or that statutorily created presumption in 2(c) when resale certificates are absent. *Jefferson Ice Co. v. Johnson* 139 Ill. App. 3rd 626 (First Dist. 1985).

In the *Jefferson Ice* case, the court indicated that the taxpayer had not overcome the presumption of taxability because its only evidence was testimony that an estimated percentage of sales were "probably" for resale. No documentation was introduced. In the case at bar, taxpayer presented documents in the form of invoices, post transaction resale certificates and

copies of customer tax returns supported by testimony of taxpayer's customer and in some cases, its customer's vendees.

The Department relies on *Tri-America Oil Co. v. Department of Revenue* 102 Ill. 2d. 234, (1984). When *Tri-America* was decided, the law said all sales were retail sales unless one had a resale certificate. That is not the law today. Section 2(c) has changed, in that if you do not have a resale certificate you can rely on "other evidence".

As to the issue on consumable supplies, I find the taxpayer has not addressed that issue and therefore the Department's prima facie case as to consumable supplies shall stand and the taxpayer shall be assessed accordingly.

Based on all of the evidence and testimony, I find that taxpayer's exhibits supported by the testimony of taxpayer's witnesses overcame both the Department's prima facie case and the rebuttable statutory presumption of taxability in section 2(c). I therefore recommend that the Notice of Tax Liability contained herein be cancelled as to this taxpayer relating to issue on resale but the use tax on consumable supplies remain and taxpayer should be assessed accordingly plus penalties and interest to date.

Daniel D. Mangiamele
Administrative Law Judge